

Comparison of Congressional Acts to Allow States to Impose a Use Tax Collection Obligation on Out-of-State Retailers

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TITLES

Main Street Fairness Act	Marketplace Equity Act of 2011	Marketplace Fairness Act
<u>S. 1452, Durbin, et al.</u> Introduced July 29, 2011 <u>H.R. 2701, Conyers, et al.</u> Introduced July 29, 2011	<u>H.R. 3179, Womack, et al.</u> Introduced October 13, 2011	<u>S. 1832, Enzi, et al.</u> Introduced November 9, 2011

THE AUTHORITY GRANTED

Authorizes <i>only Member States under the <u>Streamlined Sales and Use Tax Agreement</u> (SSUTA)</i> to require larger remote sellers to collect and remit sales and use tax with respect to remote sales sourced to that Member State under the SSUTA.	Authorizes states, either individually or with other states, to require larger remote sellers to collect and remit sales and use tax with respect to remote sales into the State (states need not be members of the SSUTA).	Authorizes Member States under the SSUTA and non-SSUTA member states to require larger remote sellers to collect and remit sales and use tax with respect to remote sales into the State.
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CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE

Congress has the authority to enact federal legislation authorizing the states to require out-of-state retailers to collect their use taxes, such as these bills, and, if such federal legislation is enacted, then it will grant the states the authority to enact legislation expanding their use tax collection obligations, without violating the Commerce Clause.

Article I, section 8, clause 3 of the United States Constitution, known as the Commerce Clause, expressly authorizes the United States Congress to regulate commerce with foreign nations and among the several States. In [Quill Corporation v. North Dakota](#) (1992) 504 U.S. 298, 318, the United States Supreme Court explained that the Commerce Clause grants the United States Congress the discretion to decide whether, when, and to what extent the states may burden interstate commerce by imposing a duty to collect use taxes on out-of-state retailers. However, the United States Supreme Court also explained that, until there is some Congressional action, (1) the Commerce Clause prohibits a state from requiring a retailer engaged in interstate commerce to collect the state's use tax unless the retailer has a "substantial nexus" with the state, and, (2) the bright line rule, established in *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois* (1967) 386 U.S. 753, that a retailer must have a "physical presence" in a taxing state in order for that state to impose a use tax collection obligation on the retailer, is still applicable today.

Therefore, the expansion of the states' use tax collection obligations, in conformity with authorizing federal legislation, such as these bills, would be immune from the types of Commerce Clause concerns that currently apply to similar state legislation in the absence of congressional action.

WHAT STATES MUST FIRST DO

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<p>To impose a tax collection and remittance requirement on remote sellers, all of the following must occur:</p> <ol style="list-style-type: none"> (1) 10 states comprising at least 20 percent of the total population of all states imposing a sales tax must have become Member States under the SSUTA. (2) Specific aspects of the SSUTA must have been implemented by the Governing Board, including, among other things, the setting of monetary allowance by contract with providers; the implementation of an online registration system; the promulgation of rules and procedures for dispute resolution and audits; and provisions for funding and staffing the Governing Board. (3) Each Member State must have met the requirements of the SSUTA to provide and maintain data-bases for sales and use tax and a taxability matrix. 	<p>To impose a tax collection and remittance requirement on remote sellers, the state must implement a simplified system for administration of sales and use tax collection with respect to remote sellers, which must include:</p> <ol style="list-style-type: none"> (1) A small seller exception. (2) A sales and use tax return for use by remote sellers and a single revenue authority within the state with which remote sellers can file. (3) Items subject to, and exempted from, the tax must be identical throughout the state, and there cannot be any special exemptions for remote sellers that do not apply to non-remote sellers (it is not clear whether this provision is only intended to require states to treat in-state sellers and remote sellers the same or if this provision is also intended to require states to treat items the same for state, local, and district use tax purposes and prohibit those “partial” exemptions in current California law, e.g. farm equipment, timber harvesting, etc., where only the state tax portion is exempt). (4) Remote sellers must collect under one of three rate structures (as determined by the state): a single 	<p>To impose a tax collection and remittance requirement on remote sellers, the non-SSUTA member states must implement a simplified system for administration of sales and use tax collection with respect to remote sellers, which must include:</p> <ol style="list-style-type: none"> (1) A small seller exception. (2) A sales and use tax return for use by remote sellers and a single revenue authority within the state with which remote sellers can file. (3) A uniform sales and use tax base among the state and the local taxing jurisdictions (this may prohibit those “partial” exemptions in current California law, e.g. farm equipment, timber harvesting, etc., where only the state tax portion is exempt). (4) A requirement for remote sellers to collect the applicable destination rate (the sum of the state rate and rate of tax in local jurisdictions in which the sale was made). (5) Adequate state-provided software and services to remote sellers and single and consolidated providers that identify the applicable destination rate to be applied on sales sourced to the state. (6) State-provided

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	<p>blended state-wide rate (including the state and local tax rates), the highest state rate (excluding the rates of tax imposed by or for the benefit of local jurisdictions), or the applicable destination rate (state rate and rate of tax in local jurisdictions in which the sale was made) provided the state provides adequate software to remote sellers to collect the destination rate.</p>	<p>certification procedures for single and consolidated providers to make software and services available to remote sellers.</p>

SMALL SELLER EXCEPTION

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<p>Exempts remote sellers from the tax collection and remittance requirements if their sales do not exceed a threshold to be established consistent with the SSUTA. Under the SSUTA, the Governing Board (established by the SSUTA) is required to develop a sales volume threshold for determining which small remote sellers qualify for an exemption from the requirement to collect taxes on remote sales.</p>	<p>Exempts from the tax collection and remittance requirements remote sellers with gross annual receipts in the preceding calendar year from remote sales in the U.S. not exceeding \$1 million, or in the state not exceeding \$100,000. States may, however, determine a greater exception amount.</p>	<p>Exempts remote sellers from the tax collection and remittance requirements if they have gross annual receipts in total remote sales in the U.S. in the preceding calendar year not exceeding \$500,000.</p>

COMMENCEMENT DATE OF THE COLLECTION OF THE TAX

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<p>Once the Governing Board determines that all of the requirements have been satisfied under the SSUTA and this Act, a Member State's authority to require remote sellers to collect and remit shall commence on the first day of</p>	<p>Once a state satisfies the requirements in the bill, the state's authority to require remote sellers to collect and remit begins on the first day of the calendar quarter at least 6 months after the date that the state publishes a public notice</p>	<p>Authorizes member states under the SSUTA to require remote sellers to collect and remit sales and use tax beginning no earlier than the first day of the calendar quarter that is at least 90 days after the date of enactment of the Act.</p>

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the calendar quarter commencing at least 6 months after the Governing Board makes its determination.	that includes the following: (1) The title and reference to the enacted state legislation requiring remote sellers to collect the tax. (2) The criteria (including the effective date) under which remote sellers are required to collect the tax. (3) The rate or rates of tax that remote sellers are required to collect. (4) References to compliance information and the form remote sellers must file.	Once a non-SSUTA member state adopts and implements the minimum simplification requirements, the state's authority to require remote sellers to collect and remit begins no earlier than on the first day of the calendar quarter that is at least 6 months after the date that the state enacts legislation to implement the minimum simplification requirements.

VENDOR COMPENSATION

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Provides minimum compensation for expenses incurred by remote sellers or third party service providers for administering, collecting, and remitting a state's taxes in accordance with the terms of the SSUTA and allows for decreases as additional simplifications and improvements in technology reduce collection costs, or increases if provisions of the SSUTA increase collection costs.	No provision is included in the bill to compensate remote sellers or third party service providers for compliance costs.	No provision is included in the bill to compensate remote sellers or third party service providers for compliance costs.

SAFE HARBORS

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<p>Requires each Member State to relieve a remote seller or service provider from liability for collecting the incorrect amount of tax, and relieve the purchaser from penalties on that liability, if the remote seller or service provider collected the incorrect amount of tax due to reliance on information provided by the state regarding tax rates, boundaries, or taxing jurisdiction assignments, or the state's taxability matrix.</p>	<p>If a state provides software to remote sellers in order to require the remote sellers to collect the applicable destination rate, then the state must also relieve the remote sellers from liability for collecting the incorrect amount of tax, including penalties and interest, provided the error was due to reliance on information provided by the state.</p>	<p>Non-SSUTA member states must: (1) Hold single and consolidated providers harmless for any errors or omissions as a result of relying on information provided by the state, (2) Hold remote sellers using a single or consolidated provider harmless for any errors and omissions by that provider, and, (3) relieve remote sellers from liability, including any penalties and interest, for collecting the incorrect amount of tax if collection of the improper amount of sales or use tax is the result of relying on information provided by the state</p>